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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1937

No. 68

PUGET SOUND STEVEDORING COMPANY,
Appellant,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Special Assistant Attorney General,

Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

Appellant unsuccessfully sought to enjoin collection of the Washington business tax (Chap. 191, Laws of 1933, as amended by Chap. 57, Laws Ex. Sess., 1933, and Chap. 180, Laws of 1935) as imposed upon the local business conducted by apellant as a "contracting stevedore" (R. 2).

The objection to the tax was that its imposition would deny appellant equal protection of the law, and

would be a prohibited burden upon interstate commerce (R. 2).

The trial court rejected both contentions and dismissed the action (R. 10).

On appeal to the Supreme Court of the State of Washington the judgment of the lower court was affirmed, the opinion being based upon the fact that appellant's business was that of rendering an independent service to carriers engaged in interstate commerce but was not itself interstate commerce (R. 25).

STATEMENT OF THE CASE

Appellant described itself in its complaint below as "an independent contractor" (Par. 6, R. 2).

The entire record shows that appellant is engaged in the business of performing contracts to load or unload ships for specified charges, the method and manner of doing the work being entirely at the option of appellant, and appellant not representing in any way either the carrier, the shipper of the goods, or the persons to whom the goods are consigned.

While it is admitted in the pleading below that appellant is an independent contractor (R. 2) and while the case was tried on that basis counsel sought on appeal to the Supreme Court of the state to argue that appellant was not an independent contractor, but was itself a carrier. That contention is maintained here although the fact was found otherwise by both the trial and appellate courts of the state (appellant's brief, p. 35).

It is respondent's contention, and the finding of the trial and supreme courts, that appellant had built up a local business of rendering services under contract, which business, while it may have been helpful to commerce, was not itself commerce, and that, therefore, a tax on that business was not a tax on the gross proceeds of interstate commerce.

ARGUMENT

Appellant Transacts a Local Business Independent of Interstate Commerce

Counsel for appellant, in the trial court, made the correct distinction between a local business conducted by one who contracts with interstate carriers, which business is taxable, and the business conducted by the interstate carrier, which is interstate commerce, which, of course, is not taxable by the state.

In this court counsel seek to avoid this distinction by ignoring the fact that appellant's business is entirely independent of interstate commerce, and claiming that since appellant's services are rendered to those who do engage in interstate commerce and in connection with goods moving continuously in interstate commerce, appellant should have the same exemption from taxation as enjoyed by an interstate carrier loading or unloading its own vessels.

At the outset it must be remembered that a ship owner will employ the services of an independent contractor such as appellant when that is the most efficient and economical method (R. 4, 5, and appellant's brief, p. 6).

It follows, therefore, that the imposition of a valid state tax on the business conducted by the contracting stevedore is no burden whatever on the ship owner, the carrier, or the consignee, in short, is no burden on interstate commerce.

In the vast majority of cases appellant's contract provides that it shall perform all services in connection

with the loading or unloading of the vessel with its own men, using its own methods, under a form of contract appearing in the record, pages 14 to 17, inclusive.

It is the proceeds realized from the performance of such contracts that the Washington State Occupation Tax is levied upon.

But in a very few instances appellant acts simply as an employment agent, furnishing laborers to the ship owners, whose laborers thereafter work under the master of the ship.

Whether appellant performs his contract by loading or unloading the ship, or by furnishing the labor, it performs its contract in its own way, the ship owner being concerned only with the accomplished result.

In either event, appellant is an independent contractor. In *Cory Bros. & Co. v. United States*, 51 Fed. (2d) 1010, the court said, in referring to the contract between ship owner and a stevedoring company:

"* * * Whether it be interpreted as employing appellant to engage others to do the stevedoring in discharging the flour or to perform the stevedoring service itself makes no difference; in either case appellant is an independent contractor. *The Satilla*, 235 F. 58 (C. C. A. 2); *The Robert R.*, 255 F. 37 (C. C. A. 2); *Soderberg v. Atlantic Lighterage Corp.*, 19 F. (2d) 286, 288 (C. C. A. 2). * * *"

Appellant operates under contract similar to the one involved in *The Satilla*, 235 F. 58, under which the steamship company may give orders as to when and where to load or discharge vessels, but under which it may not direct the manner of doing the work, which is left entirely to the contracting stevedore. It is submitted that appellant is, therefore, an independent contractor.

In *The Richelieu*, 27 Fed. (2d) 960, the court said:

"* * * In short, it is well established that an independent contracting stevedore, such as the Baltimore & Ohio Railroad Company in the present case, is responsible for the selection and proper use of the labor and equipment which it employs, even when that equipment is supplied by the vessel itself, and so the officers of the vessel owe it no duty of supervision. (Cases cited.) * * * *"

There can be no question that in performing its contracts to load or unload ships for various carriers, appellant does so as an independent contractor.

The Teno, 47 Fed. (2d) 197;
Cornec v. B. & O. R. Co., 48 Fed. (2d) 497;
Soderberg v. Atlantic Lighterage Co., 19 Fed. (2d) 286;
The Robert R., 255 Fed. 37;
Jefferies v. De Hart, 102 Fed. 765.

The question has been passed on squarely by the Supreme Court of the State of Washington in *Lund v. Griffiths and Sprague Stevedoring Co.*, 108 Wash. 220. On page 229 this court, referring to the appellant stevedoring company, said:

"* * * The appellant was an independent contractor. *Its contract was entire. It undertook to load the boat employing its own means and its own servants.*" (Italics ours.)

In the case at bar, it is undisputed that appellant alone directs the workmen, and has entire control of the method and manner of doing the work.

The earnings of appellant sought to be reached by the Washington Business Tax are the earnings from the general business of stevedoring which appellant conducts with everyone desiring its services.

Unlike a carrier which performs its own services and receives its pay for the carriage or transportation of the commodities, appellant's remuneration involves no transportation; it is simply an agreed charge for a service rendered to one who does transport, and as we have pointed out, a charge which the carrier find is good business to pay.

That charge is not increased by the amount of this tax, and would not be decreased were appellant relieved from the necessity of paying the tax.

THE IMPOSITION OF THIS OCCUPATION TAX UPON APPELLANT DOES NOT DENY IT THE EQUAL PROTECTION OF THE LAWS

A consideration of appellant's second argument will emphasize the fact that appellant is in a local business distinguished from interstate commerce, and entirely independent from the businesses conducted by carriers with whom they contract.

The point sought to be made is that the tax in the case at bar would not be imposed upon a transportation company if the master unloaded his ship with his own sailors, but would be imposed upon the stevedoring company if the master entered into a contract with it, although the work performed by the sailors in the one case and the longshoremen in the other would be identical.

The answer to the argument is apparent and brief. The steamship company and the stevedoring company are not in competing businesses.

The steamship company remains in the transportation business, notwithstanding the fact that it unloads its

cargo with its own employees. Its receipts are the receipts from commerce, which may not be taxed.

The stevedoring company is engaged in the business of rendering services to that interstate commerce, but is not itself engaged in commerce. The stevedoring company realizes receipts from its business independent of the receipts from interstate commerce.

In order to avoid the very apparent difference between appellant's stevedoring business and the carrier's transportation business, counsel for appellant have coined two new phrases which have not been used before in this case.

He now seeks to refer to the business of a carrier which uses its own sailors to load and unload as an "Integrated Operation," and the joint business of a carrier and an independent stevedoring company as a "Non-integrated Operation."

No authority for such a characterization appears anywhere, and it is submitted that appellant's business must stand alone, and that counsel may not join it with the business of a carrier in order to compare the joint businesses with the single business of a carrier who does not employ an independent stevedoring company.

In no case would either of the transportation companies be taxed.

If there were authority for joining the independent stevedoring business with the transportation business conducted by a carrier with whom the independent stevedore contracts, the state would yet tax only the proceeds realized from the local stevedoring business as distinguished from the transportation business.

We have seen by appellant's own statement that the stevedoring business is not a competitor of any transportation business, unless the transportation company should hold itself out as rendering stevedoring services to other carriers and thus itself go into the stevedoring business, in which event the proceeds from the independent stevedoring business would probably be taxable by the state.

The case of *Luckenbach v. Denney,* 152 Wash. 548, relied upon by appellant, illustrates the point. In that case the Luckenbach Steamship Company leased and operated a pier in Seattle for the purpose of discharging and receiving freight from its own vessels. The court found:

"* * * *No vessels, other than its own, berth at or use that dock.* No freight was handled over the dock except such as was brought into this state from some other state by one of respondent's vessels, or such as was brought to th dock to be carried out of this state to some other state by one of its vessels. It maintained and operated the dock solely as an instrument of interstate commerce, and *in no way held itself out as a public wharfinger, nor does it perform wharfage service as a separate or independent service, nor perform any wharfage service nor collect any wharfage charge except pursuant to interstate contracts for carriers.* * * *"* (Italics ours.)

It was, of course, therefore held that the steamship company was not a public wharfinger, and was therefore not subject to state control.

The court went on to say that the handling of its own freight by a steamship company on its own pier, by its own employees, was a part of interstate commerce. But this does not aid appellant, for appellant handles no freight of its own. It is engaged in the general business

of rendering service to others. Had the Luckenbach Steamship Company held itself out as being willing to render services to others, it would then have been engaged in a local business, subject to local control.

The controlling fact was that the Luckenbach Steamship Company did not hold itself out as a public wharfinger nor did it perform wharfage services as an independent service. It was, therefore, impossible for it to collect for wharfage services.

In the case at bar, appellant does hold itself out as being in the general business of performing stevedoring services and does collect for performance of said services.

Only two cases are cited by appellant in support of its argument that the imposition of this tax would deny it equal protection of the laws.

The first is *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389. That case involved the gross receipts tax levied on corporations engaged in operating taxi-cabs, but it was not imposed on either individuals or partnerships engaging in the identical business. The court said:

"In effect, section 23 divides those operating taxi-cabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. * * *" (Italics ours.)

It must be apparent that the situation of the stevedoring company and steamship company is quite different. The business transacted by each is of a different nature.

Appellant, as a contracting stevedore, receives money for rendering services, which is the business it transacts. Ship owners engage in interstate commerce, which is a different kind of business. So in *Colgate v. Harvey*, 296 U. S. 404, cited by appellant, there was a discrimination attempted between income derived from loans made within the state and income received from loans made without the state. In the case at bar, we have a business tax imposed without discrimination on all persons engaged in the same business.

Appellant is sought to be taxed under the general provision, section (e), title II, chapter 180, Laws of 1935, to be found on p. 510, which levied the tax on

"* * * *any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d), above.* * * *" (Italics ours.)

It will be seen, therefore, that there can be no discrimination. If the steamship company itself should go into the general stevedoring business, it would be then taxed under the same clause.

A company cannot avoid payment of a tax on a taxable business by also engaging in a non-taxable business.

Pacific Telephone & Telegraph Co. v. Tax Commission, 56 Sup. Ct. 522.

In *Raley Bros. v. Richardson*, 264 U. S. 157, it was held that merchants engaged in domestic business in respect to which they are taxed, were not denied equal protection of the laws because certain merchants engaged in interstate business could not be taxed. The court said:

"* * * It would be a strange application of the equality provision of the Fourteenth Amendment to say

that because a State is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. *It is enough if the State observe the rule of equality among the persons subject to its taxing power.*" (Italics ours.)

Hart Refineries v. Harmon, 278 U. S. 499, is to the same effect.

It is submitted that there is a broad distinction between the business of rendering services to a transportation company and the business of the transportation company itself, so that a discrimination between the two, if the legislature had made one, would have to be sustained.

Quong Wing v. Kirkendall, 223 U. S. 59;
Central Lbr. Co. v. So. Dakota, 226 U. S. 157;
Alaska Fish Co. v. Smith, 255 U. S. 44.

THE IMPOSITION OF THIS BUSINESS TAX UPON APPELLANT IS NOT FORBIDDEN BY THE COMMERCE CLAUSE

For the first time, counsel for appellant flatly state their contention that appellant is a carrier (appellant's brief, p. 35).

This was not claimed below and is not a fact. Appellant is not engaged in interstate or foreign commerce, or indeed in any kind of commerce, but counsel seek to make applicable the reasoning in cases which do involve interstate commerce, such as *McCall v. California*, 136 U. S. 104; *Texas Transport Co. v. New Orleans*, 264 U. S. 150; and *Di Santo v. Pennsylvania*, 273 U. S. 34.

In all these cases the Supreme Court of the United States found that the tax was imposed directly upon the railroad or steamship company business, and indeed was

imposed, in each case, on interstate business, at its very source. It has always been held that the soliciting of interstate business is a part of interstate commerce.

In the *Texas Transport Company v. New Orleans* case, *supra,* a "ship's agent" was sought to be taxed, but the Supreme Court found that the ship's agent did not do a general business but confined itself, exclusively, to the interstate and foreign business of its principals. The business of the ship's agent was the business of the shipping company.

The Supreme Court found, as a matter of fact, that there was no relation of independent contractor. The relation was one of principal and agent. The agent's services consisted, among other things, in soliciting and engaging cargo, naming ships for carrying the cargo, arranging for the delivery of the cargo, issuing the bills of lading, arranging for stevedores, collecting freight charges and attending to all immigration matters.

In performing *each one of these acts, the* "agent" was speaking for and binding the master, which was the shipping company.

How different is the relation which exists between the stevedoring company, whose services might be engaged by such an agent. The stevedoring company has no control whatever over the shipping business, nor any right to speak for or represent the steamship company.

In the *Di Santo* case (273 U. S. 34), the court found that Di Santo was *an agent* for four steamship companies. He made contracts for them. He procured business for them and in so doing transacted their business, which constituted interstate commerce.

The court found that the case was governed by the *McCall* and *Texas Transport* cases, and that the tax was, in fact, imposed directly upon the business of interstate commerce.

It is true that there was a minority opinion in each case and that the minority believed, on the facts, that the agent was an independent contractor rather than an agent, but counsel can derive no comfort from this fact, for both the majority and minority opinions proceeded upon the assumption that an independent business would have been taxable by the state.

These cases in reality recognize the taxability of an independent contractor, such as appellant, who conducts a local business of rendering services as distinguished from interstate commerce.

Counsel also cite *State v. Tampa Interocean Steamship Company*, 96 So., p. 828, which is another case involving a steamship agent soliciting cargo and making contracts for and on behalf of his principals.

The Supreme Court of Louisiana found that the agent was conducting a separate business, but the Supreme Court of the United States reversed this finding (266 U. S., at p. 594) under the authority of the *Texas Transport* case, for it will be seen that once again the effect of the state tax would be to tax the steamship company itself.

Counsel have also cited *State v. Murray*, 153 So. 667, which is another case of the license tax on ship brokers. The court of appeals in Alabama, in this case, finding that the ship brokers solicited cargo for the steamship

company, correctly classified the case with *Texas Transport & Terminal Company* and held the tax invalid.

In each of these cases, which are the main reliance of appellant, the business of the steamship or railroad company itself was sought to be taxed.

Had the steamship agent in these cases been an independent contractor, conducting his own business instead of the business of the railroad company, that local independent business would have been taxable by the state.

Ficklen v. Shelby, 145 U. S. 1.

Counsel for appellant have attempted to avoid the *Ficklen* case by saying that its authority was limited in *Stockard v. Morgan*, 185 U. S. 27; but this case involved "agents" representing owners of property outside of the State of Tennessee, soliciting orders within the state for property to be thereafter charged to purchasers within the state.

It, of course, directly involved interstate commerce. Here again the agents soliciting orders represented others, and were not in business for themselves as is appellant in the case at bar.

The *Ficklen* case was distinguished (but by no means weakened) for it applies to cases where local individuals or corporations are engaged in business for themselves and are not mere employees of a non-resident employer.

The drummer cases are more nearly in point, for in these cases a drummer carrying his goods with him is engaged in a local business and is taxable by a state, not-

withstanding the fact that he received the goods in interstate commerce.

It must be apparent that the *Ficklen* case goes much further than the opinion of the State Supreme Court in the case at bar, for Ficklen was in the brokerage business, which business consists of representing others in the making of contracts and it might be argued that Ficklen was a mere agent of non-resident sellers or buyers, nothwithstanding the fact that his employment was not limited to one or any definite number of such non-resident employers. In the case at bar, appellant in no sense represents a foreign shipping company. *It makes contracts with the foreign shipping company and not for it.* Appellant's business is its own business—appellant's business is not interstate commerce at all and is, of course, taxable, whereas Ficklen's business might well have been argued to be the business of each foreign client Ficklen represented.

It was, of course, necessary for the Supreme Court of the United States to classify these cases according to their particular facts.

If a local independent business of rendering services to goods which happen to be in interstate commerce or to persons who happen to be engaged in interstate commerce is involved, the case of *Ficklen v. Shelby County,* 145 U. S. 1, applies, and that local independent business is taxable.

If, on the other hand, a shipping company transacts business through a local agent, the local agent is not engaged in business for himself, but is doing his employer's

business and the *McCall, Texas Transport* and *Di Santo* cases apply.

Counsel quote from *People v. Miller,* 178 N. Y. 194, 70 N. E. 472. Reference to the facts will show that this case involved a transportation business. It was admitted in the pleadings that the entire business of the corporation "* * * consists in the transportation of personal property, consisting of grain and other products, from ports outside of the State of New York to ports and places in the State of New York, and of personal property carried by the petitioner from ports in the State of New York to ports in other states, *and that its entire gross receipts from its business are derived from such transportation and not otherwise.* * * *"

The case is not, therefore, in point. The New York statute also exempted all business of an interstate character, and the New York courts treated this exemption as more liberal than that afforded by the interstate commerce clause itself. The prevailing opinion was concurred in solely on account of this exemption.

In any event, the case was decided upon the admitted fact that the corporation was an interstate carrier. The reasoning of this opinion assumes that the business of a separate corporation rendering services to such an interstate carrier would be taxable even though the business of the carrier itself is not taxable.

ASSUMING WORK PERFORMED BY A LONGSHOREMAN AND A SAILOR TO BE IDENTICAL, APPELLANT'S BUSINESS IS STILL TAXABLE

Counsel call attention to the fact that work which is performed by appellant's employees was originally performed by the crew of the vessel and still is performed

by the crew in cases where the master does not see fit to retain the services of contracting stevedores such as appellant.

But the similarity of the work in either case does not alter the fact that the contracting stevedore is engaged in the general stevedoring business, and that the ship master is not engaged in such business when unloading his own cargo.

It follows, therefore, that cases cited by appellant, such as *The Senator*, 21 Fed. 191; *Florez v. The Scotia*, 35 Fed. 916, and *The Main*, 51 Fed. 954, have no bearing on the question of whether an independent business is taxable. Those cases simply hold that one who makes a contract with the master of a vessel to perform services as a stevedore may proceed *in rem* against the vessel for his wages.

Nor does *International Stevedoring Co. v. Haverty*, 272 U. S. 50, deal with any other question than the remedy available to an injured longshoreman.

It was assumed in that case that the stevedoring company was engaged in a separate business, and it is apparent in the case at bar that appellant is engaged in a local business entirely distinct from the business conducted by the ship owner.

It is not, as the counsel argues, the place where the agent works which decides whether or not his operations are taxable, but the question is whether or not it is an independent business.

If, as in cases relied upon by counsel, a foreign transportation company had an agent transacting its business in the State of Washington, that agent would not be sub-

ject to a business tax for he has no business separate and apart from the business of his employer whom he represents.

But in the case at bar, the stevedoring company, unlike a ship's agent, cannot represent the carrier, it does no business *for* the carrier but does do business *with* it.

This being so and there being an independent local business, all courts recognize that a state tax, if otherwise valid, may be imposed upon that business.

STEVEDORING CONDUCTED AS AN INDEPENDENT BUSINESS IS NOT A COMPONENT PART OR LINK OF INTERSTATE COMMERCE.

Although appellant is not a carrier, receives no money for transportation services, but is engaged solely in the business of performing services for others, counsel seeks to argue that this independent business is a link or part of interstate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, which was an attempt by the legislature of Pennsylvania to tax a New Jersey corporation whose entire business consisted of operating an interstate ferry is relied on. The company's property, including its boats, had its situs in New Jersey. It simply leased a wharf in Pennsylvania for its own use in connection with the carrying of passengers and freight between the two states.

Had the ferry company, instead of operating its own wharf, engaged the services of a public wharfinger, the charges which might be made by the public wharfinger would be regulated by the state, and the business conducted by such public wharfinger would be taxable by the state.

Appellant's situation in the case at bar is analogous to the business of the public wharfinger, not to the business of the interstate carrier which operates its own wharf.

Again, appellant is organized under the laws of the State of Washington. It transacts its entire business within that state. It is governed, regulated, protected and taxed by that state without Federal intervention.

A state may grant a franchise for a boundary line ferry, and may exact a license fee from the ferry company. *Wiggins Ferry Co. v. St. Louis,* 107 U. S. 365, and the state may regulate the rates to be charged by such a ferry, at least where Congress has not intervened. *Port Richmond Ferry v. Hudson County,* 234 U. S. 317.

In this last cited case, the Supreme Court pointed out that a ferry operated in connection with a railway as a part of continuous interstate transportation would probably require a uniform system of regulation, *but that independent ferries established by state authority are local in their nature and are subject to local regulation.*

For a much stronger reason, appellant's business is entirely local and taxable by the state.

There can be no question as to the correctness of the decision in *Rhodes v. Iowa,* 170 U. S. 412. In that case a package was held to be in transit while stored in the depot of the carrier where it had been placed by the carrier's agent prior to delivery.

There was no question of an independent warehouse business, nor of any independent local business, nor indeed of the right to tax. The depot was owned by the

railway for its own purposes and was operated by its own employees.

The question in the case at bar is not whether the goods upon which the services are performed are in interstate or intrastate movement, but is simply whether or not appellant is engaged in an independent business of rendering services to others who may be engaged in interstate commerce.

The question in the case at bar is not whether an employee of appellant while working on a ship is engaged in work of a maritime nature, nor whether his remedy, if injured, would be under the Federal employers' liability act or the state act.

The only question is, does the imposition of a nondiscriminatory occupation tax on the proceeds realized from the business of supplying with laborers or their services to interstate commerce constitute a direct and forbidden burden on that commerce? Manifestly, it does not.

The liability of a local business to a business tax is not to be evaded by the fact that employees derive rights under Federal laws, or that instruments necessary in carrying on the business are licensed and regulated by Federal act.

Nor is the tax liability of a local business which renders services to interstate commerce to be determined by the taxability of the articles which are in transportation and in connection with which the services are rendered.

THE TAX IMPOSED, AS IT IS, ON ONE WHO CONTRACTS WITH A CARRIER, IS NOT ON THE CARRIER, AND IS NOT A FORBIDDEN BURDEN ON INTERSTATE COMMERCE.

The tax commission, in imposing the occupation tax on persons engaged in the business of performing services within the state to carriers under contract has made the correct distinction between local activities, which constitute a local business and are taxable, and activities of the same nature which, if conducted by a common carrier, would not constitute a separate local business and would not be taxable.

An occupation tax imposed upon the business of an independent contractor dealing with the Federal government would be valid. *Trinity Farms v. Grosjean*, 291 U. S. 466; *General Construction Co. v. Fisher*, 39 Pac. (2d) 358.

For a stronger reason the Washington tax, as imposed on an independent contractor doing business with a common carrier, is valid, for it is well understood that a certain amount of interference with interstate commerce by the states cannot be avoided, and that a state tax will be sustained unless it amounts to a direct and substantial regulation of or restraint upon interstate commerce.

Hump Hairpin Co. v. Emmerson, 258 U. S., at p. 294;

Gillespie v. Oklahoma, 257 U. S. 501.

A common carrier requires services of many local business concerns who are permanently engaged in business within this state. Proceeds realized from these businesses are taxable.

Among the services frequently required by carriers from local business establishments are repairing of vessels, piloting, wharfage, etc., and insuring, processing, storing, packing, and handling of the cargo.

It will be seen that the companies which render such services to interstate commerce are not themselves engaged in that commerce. For instance, companies engaged in the repair business pay this tax on proceeds realized from repairing vessels, although repairing of the vessel is necessary to the movement of the cargo. The company transacts a local business, and that business is taxable, notwithstanding the fact that the ship owner might have elected to repair the vessel himself, in which event there would be no local taxable business.

In *Hooper v. California,* 155 U. S. 655, and the cases following and sustaining it, it was held that the business of insuring interstate cargo, while necessary to interstate commerce, was not interstate commerce.

William v. Fears, 179 U. S. 270, is particularly in point inasmuch as plaintiff sometimes acts as an employment agent. The court held that labor agents, within the State of Georgia engaged in hiring persons to be employed outside of the state, were not engaged in interstate commerce.

The court also said that equal protection of the laws was not denied although the same tax was not imposed upon the business of hiring persons to labor within the state.

In this case the court pointed out the distinction between the case at bar and cases cited by plaintiff in which the interstate carrier itself is sought to be taxed.

In *United States v. Moore,* 275 Fed. 992, the payment of brokerage fees (on shipments secured through freight brokers) by steamship companies, was held not to be interstate or foreign commerce.

At page 995, the district judge said:

"* * * Brokerage, by whomsoever paid, is merely an aid or facility whereby shipment may be more easily and readily accomplished. It is in no sense interstate or foreign trade or commerce."

As an example of services rendered in processing goods which are in interstate commerce, we cite *Jorgensen-Bennett Mfg. Co. v. Knight,* S. W. (2d), at page 668.

In this case a state tax on earnings from kiln-drying and resurfacing lumber, shipped from points outside the state through the state on through bills of lading, was held not to be a tax on interstate commerce and was sustained as a tax on a local business. It was contended that the goods which were handled were in a continuous interstate movement from points outside of and to points outside of the State of Tennessee. The processing, or "remanufacturing," was necessary to diminish the weight of the lumber and fit it for final delivery in the shape in which it had been contracted to be delivered.

Nevertheless, the Supreme Court of Tennessee held that the business which was taxed was a local business and that it was immaterial that the lumber upon which the services were rendered was the subject of interstate commerce.

It may be argued that a tax on the local services rendered in the *Knight* case or in the case at bar would increase the cost of those services to the carrier. But all of the cases hold that this is not a forbidden burden. The

following language from *Erie Railroad v. Penn.*, 158 U. S., at page 439, aptly expresses the universal rule:

"It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

A much stronger case for taxability is *The Ponce Lighter Company v. Mun. of Ponce*, 19 Porto Rico 725. In that case the plaintiff was the owner of several lighters in the Port of Ponce which were used in loading and unloading steamers coming from the United States and foreign ports.

The City of Ponce levied a license tax on the exercising of plaintiff's business. Plaintiff so operated 23 lighters and was engaged in a local business, but, of course, he objected to the payment of the tax, claiming that his business had the character of interstate commerce and that he had already paid the property tax on the value of the lighters which he admitted would not be a burden on commerce.

The case was considered and on motion reconsidered. The opinion on reconsideration is exhaustive. All of the applicable United States court cases are cited and reviewed.

The court, in construing the municipal tax, said that it was its duty to sustain the constitutionality of the act unless it was proven to be contrary to the constitution

beyond all reasonable doubt and that any doubt should be settled in favor of the validity of the law.

The court pointed out in this case in effect that the lighterage company was in no sense a connecting character.

In the case at bar, of course, this is true. Appellant is not a carrier at all.

It must always be borne in mind that the state has power to prescribe rules for the licensing and governing of pilots, the collection of their fees, and other incidental matters in the nature of services to interstate commerce.

Cooley v. Board of Wardens, 53 U. S. 298;
Huus v. New York Steamship Co., 182 U. S. at 393;
State v. Ames, 47 Wash. 328.

The power to tax will be sustained whenever possible. The state retains the power to tax a business local in its nature, even though the Federal government may license and regulate that business under the commerce clause.

Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17.

In this case a warehouse licensed and regulated by the Federal government under the commerce clause was held to be doing a local, taxable business, even though an attempt was made by contract to make the warehouseman an agent of the carrier so as to avoid local taxation.

In *Larabee Flour Mills Company v. Missouri Pacific* (Ken.), 88 Pac. 72, it was held that the "switching" of cars loaded with freight to be thereafter transported to another state was a purely local business independently

contracted for under state control and was, therefore, under state control.

This was so, notwithstanding the fact that the Missouri Pacific was an interstate carrier. In respect to the switching, however, it was an independent contractor. The court said:

"Its work is that of switching cars. The service is purely local. *It is independently contracted for.* * * *. This being true, it is subject to state control. *Penn. R. R. Co. v. Knight,* 192 U. S. 21, and cases cited in the opinion." (Italics ours.)

The holding in this case follows *Chicago, Milwaukee & St. Paul Railway Company v. Becker,* 32 Fed. 849, where it was held that railroad service, known as "switching," was local and could be regulated by a commission appointed under a state act.

The case of *Penn. Railroad Co. v. Knight,* 192 U. S. 21, which has been so often cited, is one where the railroad company, an interstate carrier, maintained a cab service to and from its terminus in the City of New York.

By the company's regulations the use of the cabs was limited to persons either going to or coming from the State of New Jersey by the company's ferry. Nevertheless, the Supreme Court held that the cab service was essentially an independent local business and was subject to the control of the State of New York and that the railroad company was not exempt from payment of a state privilege tax simply because it was engaged in interstate commerce. The court held that a separation existed in fact between the local business and the interstate business and pointed out that the local business was "independently contracted for."

Even in the case of brokers who act as agents of transportation companies there may be an independent business. If there is, that independent business is taxable. *Ficklen v. Shelby County,* 145 U. S. 1.

There is no conflict between the *Ficklen* case and *McCall v. California,* 136 U. S. 104, and the cases which follow it, relied upon by appellant. In these cases there was no local business to be taxed. In the *Ficklen* case there was. In the case at bar, there is admittedly a local independent business further removed from interstate commerce, for appellant is in no way authorized to represent any transportation company for whom it renders services.

CONCLUSION

The challenged tax was properly sustained in view of the fact that appellant conducts a local business independent of interstate commerce, and appellant may not avoid liability by arguing that it does business with interstate carriers or by arguing that it renders services to goods in interstate commerce.

A sharp distinction exists between appellant's business, which consists of performing contracts to render services to interstate commerce, and the business of interstate commerce itself. An occupational tax on appellant's business is, therefore, not a tax on interstate commerce at all.

If it be argued that the imposition of such a tax would have an indirect effect on interstate commerce, it must be remembered that the cases point out that an indirect burden is not prohibited.

Moreover, the Supreme Court of the United States, in *Pacific Telephone & Telegraph Co. v. Tax Commission*, 56 Sup. Ct. 522, in sustaining this identical tax as imposed on the local business transacted by the telephone company, said:

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an ad valorem property tax upon tangible property used exclusively in such business."

Ad valorem taxes on property or carriers engaged in interstate commerce are not a prohibited burden.

The judgment of the court below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 68.—October Term, 1937.

Puget Sound Stevedoring Company, Appellant, *vs.* The Tax Commission of the State of Washington and others, Appellees.	Appeal from the Supreme Court of the State of Washington.

[November 8, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A tax laid upon the business of a stevedoring company, the amount to be measured by a percentage of the gross receipts, has been sustained against the protest of the taxpayer that an unlawful burden is imposed thereby upon interstate and foreign commerce. We are to determine whether the tax is valid either altogether or in part.

A statute of the state of Washington provides that for the privilege of engaging in business activities within the state a tax shall be payable by persons so engaged, payment to be made according to a designated measure. As to certain forms of business, as, for example, manufacturing and sales at retail or wholesale, the measure is a specially prescribed percentage of the value of the products or the gross receipts of sales. As to all other forms of business there is a general provision that the tax shall be equal to the gross income of the business multiplied by the rate of one half of one per cent. Washington Laws 1935, c. 180. This general provision is broad enough to cover the business of a stevedore.

Appellant, the Puget Sound Stevedoring Company, is a Washington corporation. It is engaged in the general stevedoring business at Seattle and at other ports on Puget Sound. At times it contracts with a shipowner or shipmaster to load or discharge a vessel through its own employees, controlling and directing the work itself. The great mass of its business, as we were informed upon the argument, is done in that way. At times, however, even though comparatively infrequently, it makes a different kind of contract

which changes essentially its relation to the ship. In this second form of contract it does not undertake to control, direct, or supervise the work. It "merely collects the longshoremen and supplies them to the vessel", advancing their pay at the completion of the job and "billing the ship and her owner the amount of the pay-roll plus a commission for services". All vessels served by the appellants are engaged exclusively in interstate or foreign commerce.

A suit by the taxpayer to enjoin the tax officials of the state from proceeding to collect the tax was dismissed by the trial court after a hearing upon bill and answer, the answer not disputing the allegations of the bill. The Supreme Court of Washington affirmed the dismissal, its judgment being placed upon the ground that the taxpayer was an independent contractor engaged in a local business. 189 Wash. 131; 63 Pac. (2d) 532. The case is here upon appeal. 28 U. S. C. § 344.

1. The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. "Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'." *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. *Baltimore & O. S. W. R. R. Co.* v. *Burtch*, 263 U. S. 540. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a "seaman." *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. A stipulation in the record tells us that any serious interruption in the service of such cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. We might take judicial notice of the fact if the stipulation were not here.

What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. Cf. *Baltimore & O. S. W. R. R. Co.* v. *Burtch, supra.* True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. It took in the work of carriage to and from the "first place of rest", which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. Sometimes, though not, it seems, under appellant's contracts, the work in the hold is done by members of the crew, and the work upon the dock by employees of the dock company. Sometimes the cost is absorbed by the vessel and sometimes billed as an extra charge to shipper or consignee. The fact is stipulated, however, that no matter by whom the work is done or paid for, "stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the 'first place of rest', and vice versa." In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in *Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21, 26, where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being "contracted and paid for independently of any contract or payment for strictly interstate transportation."

The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 341-342; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Galveston H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Matson Navigation Co.* v. *State Board of Equalization,* 297 U. S. 441, 444; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655. The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the

states. What is decisive is the nature of the act, not the person of the actor. An independent contractor undertaking to navigate a vessel would have the same protection as a pilot agreeing to navigate it himself.

2. The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state.

What is done by appellant in connection with activities of this order is similar in many aspects to the work of a ship's chandler, and even more closely similar to that of a labor or employment bureau. Such a bureau was considered in *Williams* v. *Fears*, 179 U. S. 270, 278, and its business found to be no part of interstate or foreign commerce, though the transactions of such commerce were increased thereby. Cf. *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21, 22; *Chassaniol* v. *Greenwood*, 291 U. S. 584. Little analogy exists between the activities now in question and those reviewed in *McCall* v. *California*, 136 U. S. 104; *Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S. 150; and *Di Santo* v. *Pennsylvania*, 273 U. S. 34. The contractors there considered were found to be acting as agents of foreign steamship companies with authority to make contracts binding on the principals and even running in their names. If appellant stands in that relation to the vessels that it serves in this branch of its activities, it has failed to make the fact apparent by the allegations of its bill. The effect of such a showing is not before us now.

The decree of the Supreme Court of Washington being erroneous to the extent here indicated and no farther is modified accordingly, the cause being remanded for further proceedings not inconsistent with the opinion of this court.

It is so ordered.